Slip Op. 06–53

FORMER EMPLOYEES OF ELECTRONIC DATA SYSTEMS CORP., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Judge Judith M. Barzilay
Court No. 03–00373

JUDGMENT

In December 2002, Plaintiffs, the Former Employees of Electronic Data Systems Corporation, I Solutions Center, Fairborn, Ohio ("EDS"), filed their petition for trade adjustment assistance ("TAA") benefits with Defendant, the Department of Labor ("Labor"). In February 2003, Labor denied Plaintiffs' petition for TAA on the grounds that the facility where Plaintiffs worked prior to their separation did not produce "articles" within the meaning of Section 222 of the Trade Act of 1974, 19 U.S.C. § 2272(a) (2000). Based on EDS's explanation that it produced computer programs, job control language, database support and documents and third party support and documentation, Labor found that EDS was involved in providing services and not in a production of articles. Plaintiffs then sought review by the Court, and this court remanded the case to the Secretary of Labor for further investigation. On January 31, 2005, Labor issued the second negative determination reasserting its position that Plaintiffs did not produce "articles." After reviewing Labor's results, this court remanded the case again in November 2005, instructing Labor to further investigate the nature of EDS's work and directing it to provide the court with a reasoned explanation why software not sold to the client on a physical medium was not an article within the meaning of Section 222.

Upon the second remand, Labor has altered its position, "revis-[ing] its policy to acknowledge that, at least in the context of this case, there are tangible and intangible articles and to clarify that the production of intangible articles can be distinguished from the provision of services." *Notice of Revised Determination on Remand*, *EDS*, at [3]. Labor's new policy – that Labor stated needs elaboration

through rulemaking – is that "[s]oftware and similar intangible goods that would have been considered articles for the purposes of the Trade Act if embodied in a physical medium will now be considered to be articles *regardless of their method of transfer*." *Notice of Revised Determination on Remand, EDS*, at [3] (emphasis added).

Applying this new policy to the present case, Labor concluded that a significant portion of the workers at EDS were engaged in the production of articles based on its findings that "the former employees spent a considerable amount of their work time on the development of significant enhancements that include new code, and the development of totally new software." *Notice of Revised Determination on Remand, EDS* at [6]. Consequently, Labor determined that "[a]ll workers of [EDS], who became totally or partially separated from employment on or after December 27, 2001, through two years from the issuance of this revised determination, are eligible to apply for Trade Adjustment Assistance under section 223 of the Trade Act of 1974." *Notice of Revised Determination on Remand, EDS*, at [8]. In a letter dated April 12, 2006, Plaintiffs informed the court that they have no adverse comments to offer and waived their right to file comments on the remand results.

Upon consideration of Labor's remand determination, *Notice of Revised Determination of Remand*, the court's prior opinions in this case, and other papers and proceedings filed herein; it is hereby

ORDERED that Labor's decision to certify Plaintiffs to receive TAA benefits is supported by substantial evidence and is otherwise in accordance with law; and it is further

ORDERED that Labor's *Notice of Revised Determination on Remand* filed on March 24, 2006, is affirmed in its entirety.

Slip Op. 06–54

PARKDALE INTERNATIONAL, Plaintiff, and RUSSEL METALS EXPORT, Plaintiff-Intervenor, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Before: Barzilay, Judge
Court No. 05–00316

OPINION

[Plaintiff's motion for summary judgment on agency record is denied].

April 17, 2006

Hunton & Williams LLP (*William Silverman*), *Richard P. Ferrin*, for the plaintiff.
Sharretts, Paley, Carter & Blauvelt, P.C. (*Peter Jay Baskin, Beatrice A. Brickell*), for the plaintiff-intervenor.

Peter D. Keisler, Assistant Attorney General; *David Cohen*, Director; (*Jeanne E. Davidson*), Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*David S. Silverbrand*); *Kemba Eneas*, International Trade Administration, Department of Commerce, of counsel, for the defendant.

Skadden Arps Slate Meagher & Flom LLP (*John J. Mangan*), *Robert E. Lighthizer*, *Jeffrey D. Gerrish*, *Stephen F. Munroe*, for the defendant-intervenor.

BARZILAY, Judge: Plaintiff, Parkdale International, a reseller, exporter and importer of corrosion-resistant carbon steel products ("CORE") from Canada to the United States, moves for judgment on the agency record pursuant to USCIT Rule 56.2, seeking review of the final results in *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, 70 Fed. Reg. 13,458 (Dep't Comm., Mar. 21, 2005) (hereinafter "Final Results"), *as amended by* 70 Fed. Reg. 22,846 (Dep't Comm., May 3, 2005). Specifically, Plaintiff and Plaintiff-Intervenor, Russel Metals Export ("Russel"), a Canadian reseller of CORE, challenge the Department of Commerce's instructions to the Bureau of Customs and Border Protection ("Customs"), based on Commerce's new unreviewed reseller policy rule published on May 6, 2003, to liquidate, at the "all-others" rate, entries of subject merchandise entered prior to May 6, 2003. The court exercises jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) to review Commerce's antidumping determination made under 19 U.S.C. § 1516a(b)(1) and 19 U.S.C. § 1675.

I. BACKGROUND

Commerce first published its antidumping duty order on CORE from Canada on August 19, 1993. *Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, 58 Fed. Reg. 44,162 (Dep't Comm., Aug. 19, 1993). On October 15, 1998, Commerce published a notice in the Federal Register announcing that it intended to clarify its regulation 19 C.F.R. § 351.212[1] regard-

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[1] The regulation to be clarified, 19 C.F.R. § 351.212(c), provides:

(c) Automatic assessment of antidumping and countervailing duties if no review is requested.

(1) If the Secretary does not receive a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:

(i) Assess antidumping duties or countervailing duties, as the case may be, on the subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) To continue to collect the cash deposits previously ordered.

(2) If the Secretary receives a timely request for an administrative review of an order (see paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section.

ing the automatic liquidation of entries subject to an antidumping duty order where a reseller exports subject merchandise to the United States. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 63 Fed. Reg. 55,361 (Dep't Comm., Oct. 15, 1998) (notice and request for comment). On March 25, 2002, Commerce asked for additional comments on the October 15, 1998 proposal. *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties; Additional Comment Period*, 67 Fed. Reg. 13,599 (Dep't Comm., Mar. 25, 2002). Parkdale submitted comments on April 1, 2002 and Russel supported Parkdale's views. *See Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, at 10 (Mar. 14, 2005), P.R. 154 (hereinafter "Issues and Decision Mem."). After receiving and reviewing comments, Commerce published a notice officially implementing its unreviewed-reseller procedure on May 6, 2003. *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954 (Dep't Comm., May 6, 2003) ("Reseller Policy"). The Reseller Policy, characterized by Commerce as a "clarification" of the duty assessment procedure for unreviewed resellers, states:

> [A]utomatic liquidation at the cash-deposit rate required at the time of entry can only apply to a reseller which does not have its own rate if no administrative review has been requested, either of the reseller or of any producer of merchandise the reseller exported to the United States. If the Department conducts a review of a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales. If, in the course of an administrative review, the Department determines that the producer knew, or should have known, that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all-others rate if there was no company-specific review of the reseller for that review period.

68 Fed. Reg. 23,954. The new policy applies to entries "for which the anniversary month for requesting an administrative review" is May 2003 or later. *Id.* at 23,956.

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(3) The automatic assessment provisions of paragraphs (c)(1) and (c)(2) of this section will not apply to subject merchandise that is the subject of a new shipper review (see § 351.214) or an expedited antidumping review (see § 351.215).

For the period of review at issue, August 1, 2002, through July 31, 2003, Commerce published, on August 1, 2003, a notice of opportunity to request an administrative review of antidumping and countervailing duty orders, including the antidumping duty order on CORE from Canada. *Antidumping or Countervailing Duty Order, Finding, or Suspended Liquidation; Opportunity to Request Administrative Review*, 68 Fed. Reg. 45,218 (Dep't Comm., Aug. 1, 2003) (stating that interested parties would have opportunity during August 2003 to request administrative review of antidumping duty order on CORE from Canada). Parkdale did not request such a review.

On September 13, 2004, Commerce published the preliminary results of its administrative review of CORE products from Canada for the period August 1, 2002, through July 31, 2003. *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty and Administrative Review*, 69 Fed. Reg. 55,138 (Dep't Comm., Sept. 13, 2004) ("Preliminary Results"). In this notice, Commerce stated that the Reseller Policy "will apply to entries of subject merchandise during the period of review produced by companies included in these final results of review for which the reviewed companies did not know their merchandise was destined for the United States" and that accordingly, Commerce would instruct Customs "to liquidate unreviewed entries at the 'all-others' rate if there is no rate for the intermediate company(ies) involved in the transaction." *Id.* at 55,142. Commerce issued draft liquidation instructions for entries of CORE from Canada reflecting this intention. P.R.[2] 140.

Parkdale responded to this administrative review, arguing that liquidation of its entries entered prior to May 6, 2003, at the "all-others" rate would constitute an unlawful retroactive application of the Reseller Policy and that Commerce should instead apply the cash deposit or bonding rate as it had prior to the new rule. P. R. 140. Commerce declined to adopt Parkdale's arguments and published Final Results on March 21, 2005. *Final Results*, 70 Fed. Reg. 13,458. Prior to this determination, Parkdale's CORE imports had been subject to a cash deposit rate of 4.24 percent. The applicable "all-others" rate for Parkdale's entries was 18.71 percent. *Issues and Decision Mem.* at 8.

Unlike Parkdale, Russel initially requested a review of its exports of subject merchandise. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review*, 68 Fed. Reg. 56,262 (Sept. 30, 2003). On November 7, 2003, Commerce sent an antidumping duty questionnaire to Russel. Def.'s Resp. 5. On September

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[2] "P.R." is an abbreviation for the Public Records in the review initiated by Russel and the numbers following "P.R." correspond to the "Index to Administrative Record" numbers transmitted by Commerce to the court for this case.

9, 2003, Russel, along with several other Canadian resellers that requested administrative review, discussed with Commerce the application of the Reseller Policy. *See Mem. Sept. 9, 2003 Meeting with Canadian Industry and Government Representatives*, P.R. 13. The Canadian resellers informed Commerce that they would be unable to provide the Cost of Production/Constructed Value (COP) information normally requested in Section D of the standard antidumping questionnaire. *See Letter from Russel to Commerce*, P.R. at 39. Russel advised Commerce that the starting point for providing cost information in the questionnaire response must be the acquisition price from the Canadian producer of the steel. *Letter from Russel to Commerce*, P.R. at 39. Subsequently, Russel submitted a letter dated November 21, 2003, to Commerce asking that it be allowed to calculate production costs based on its acquisition costs instead of mill production costs. *See Letter from Russel to Commerce*, P.R. 39. In that letter, Russel stated that it "reasonably believes that the DOC [Department of Commerce] will conclude that its vendors did not know that the subject merchandise sold to Russel was destined to the U.S. at the time of sale." *Letter from Russel to Commerce*, P.R. 39. Russel also asked for an extension from the original due date of December 23, 2003 for submitting its responses to the questionnaire. *Letter from Russel to Commerce*, P.R. 39. However, on December 24, 2003, Russel withdrew its request for an administrative review. Prior to receiving Russel's withdrawal, on December 29, 2003, Commerce sent a reply to Russel's letter dated November 21, 2003, granting Russel an extension until January 12, 2004, and advising that Russel should respond to the questionnaire to the best of its ability. *Letter from Commerce to Russel*, P.R. 48. Commerce contacted Russel after receiving Russel's withdrawal letter, and Russel confirmed that it wanted to withdraw from the review. *Issues and Decision Mem.*, A.R. Pub. Doc. 154.

After Commerce issued its Final Results, Plaintiff filed this action, challenging Commerce's application of the Reseller Policy to its entries of CORE from Canada made during the period August 1, 2002, through July 31, 2003. Parkdale argues that the new rule should not be applied to any entries made before May 6, 2003, by manufacturers, producers, or exporters for which the Department did not conduct an administrative review. It challenges Commerce's application of the new rule to its pre-May 6, 2003 entries as impermissibly retroactive and, therefore, not in accordance with law under 19 U.S.C. § 1516a(b)(1)(B). Russel supports this position and further claims that Commerce failed to provide it with practicable assistance under 19 U.S.C. § 1677m(c) during the administrative review.

II. STANDARD OF REVIEW

This court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evi-

dence on the record, or otherwise not in accordance with law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)).

In this case, Plaintiff does not claim that the Reseller Policy is by its terms unlawful, but challenges Commerce's application of the new rule as impermissibly retroactive. Thus, at issue is Commerce's decision to apply the new rule to entries that were made prior to the rule's effective date. "It is well established 'that an agency's construction of its own regulations is entitled to substantial deference.' " *Martin v. Occupational Safety and Health Rev. Comm'n*, 499 U.S. 144, 150 (1991) (quoting *Lyng v. Payne*, 476 U.S. 926, 939 (1986)). When an agency is authorized to engage in notice-and-comment rulemaking, substantial deference is afforded to that agency's reasonable interpretation of its regulations. *See United States v. Mead Corp.*, 533 U.S. 218, 230–231 (2001); *Lee v. United States*, 329 F.3d 817, 822 (Fed. Cir. 2003) (stating that "a great amount of deference is owed to an agency's interpretation of its own regulations").

However, "a statutory grant of legislative rulemaking authority will not encompass the power to promulgate retroactive rules unless that power is expressly conveyed by Congress." *California Indus. Products. Inc. v. United States*, 28 CIT ___ , ___ , 350 F. Supp. 2d 1135, 1142 (2004) (citing *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 24 CIT 485, 492, 102 F. Supp. 2d 486, 493 (2000)). Therefore, no deference is afforded to the agency's new statutory interpretation embodied in a new rule or regulation where the agency gives a retroactive effect to its regulation without explicit notice. *See Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 365, 738 F. Supp. 541, 543 (1990) ("[A]n administrative regulation will not be construed to have retroactive effect unless the language requires such a result.").

III. DISCUSSION

A. The Statutory and Regulatory Scheme for Assessment of Antidumping Duties

Dumping is initially determined in a less-than-fair-value investigation. If Commerce makes a preliminary affirmative determination that dumping is occurring, it "attempt[s] to determine an individual weighted-average dumping margin . . . for each known exporter or producer of the subject merchandise." *See* 19 C.F.R. § 351.204(c) (2005). Commerce assesses antidumping duties based on the amount "the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise." *See* 19 U.S.C. § 1673e(a)(1) (2000). "The Department also calculates an 'all-others' dumping margin, which is the simple average of the calculated company-specific margins." 63 Fed. Reg. at 55,362. Commerce applies this "all-others" rate to entries of merchandise from producers

and exporters for which the Department has not established a company-specific rate. Commerce publishes its preliminary determination notice and directs Customs to collect a bond or cash deposit at the time the merchandise subject to an investigation enters the United States. *See* 19 U.S.C. § 1673b(d). Then, if the International Trade Commission makes a final affirmative determination that the dumping is causing injury to a United States industry, Commerce calculates final dumping margins, publishes an antidumping duty order, and instructs Customs to continue to collect a cash deposit of estimated antidumping and countervailing duties at the rates included in the final determination. *See* 19 C.F.R. § 351.211.

A subsequently published antidumping order "requires the deposit of estimated antidumping duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on that merchandise are deposited." 19 U.S.C. § 1673e(a)(3). For resellers, Commerce determines cash deposit rates as follows:

> The Department instructs Customs to apply any reseller's company-specific cash deposit rate to entries of merchandise sold by that reseller. If there is no company-specific reseller cash deposit rate and the importer identifies the producer, the Department instructs Customs to apply the producer's cash deposit rate to the entry. This logic stems from the fact that, when subject merchandise enters the United States through a reseller, the Department does not know who set the price of the subject merchandise to the United States. The Department instructs Customs to apply the producer's cash deposit rate where the producer of the merchandise is identified on the assumption that the producer knew that the merchandise was destined for the United States. This assumption is more often true than not. Subject merchandise sold through a reseller and imported where there is no company-specific reseller rate or where the importer did not identify the producer of the merchandise is subject to the all-others cash deposit rate.

63 Fed. Reg. at 55,362.

The antidumping duty imposed by this final order is reviewable "[a]t least once during each 12-month period beginning on the anniversary of the date of [its] publication" pursuant to 19 U.S.C. § 1675(a)(1). Any "interested party," defined by 19 U.S.C.A. § 1677(9) and including the importer of record, can request administrative review of an antidumping duty order pursuant to 19 U.S.C.A. § 1675. For example, interested parties can "request a review of a reseller which does not have its own rate because they believe the actual dumping liability is higher or lower than the cash deposit or, if the producer which supplied the reseller is reviewed, the all-others rate." 63 Fed. Reg. at 55,362. If no review of a producer's sales is requested, automatic liquidation applies to entries of merchandise ex-

ported by that producer. *See* 19 C.F.R. § 351.212(b). "Likewise, entries of a producer's merchandise sold to the United States by a reseller will be liquidated at the producer's cash deposit rate (if there is no company-specific rate for the reseller at the time of entry and no review has been requested for either the producer or the reseller)." 63 Fed. Reg. at 55,363.

During an administrative review, Commerce analyzes the data related to the named respondent, whether it is the manufacturer or third-party reseller that sold or exported subject merchandise to the United States. *See* 19 C.F.R. § 351.213. Importantly, Commerce must examine the first sale where the manufacturer or reseller knew merchandise would be exported to the United States. *See* 19 U.S.C. § 1677a (stating that "export price" is "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States"). When the manufacturer knows the destination of its products sold to a reseller, then the manufacturer's sale to such reseller will be within the scope of the review. Otherwise, any entries of merchandise that come to the United States without the producer's knowledge and for which liquidation has been suspended at the producer's cash deposit rate will not be subject to a final antidumping duty rate at the conclusion of the producer's review. *See* 63 Fed. Reg. at 55,363. "The determination [resulting from the review] shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination." 19 U.S.C. § 1675(a)(2)(C).

In the October 15, 1998, notice of its Reseller Policy, Commerce explained that there was confusion about its practice of assigning the producer's cash deposit rate to resellers that identify the producer at the time of entry. *See* 63 Fed. Reg. at 55,361. "At issue [was] whether a producer's company-specific cash deposit rate can serve as the basis for automatic liquidation under section 351.212(c) where an intermediary (e.g., a reseller, a trading company, an exporter) exports the merchandise and where the entries are suspended at the producer's cash-deposit rate." *Id.* at 55,361–62. Commerce explained its position as follows:

> [A]utomatic liquidation at the cash deposit rate required at the time of entry can only apply to a reseller if no administrative review has been requested, either of the reseller or of any producer of the merchandise the reseller exported to the United States, and the reseller does not have its own cash deposit rate. If the Department conducts a review of a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales. If, in the course of an administra-

> tive review, the Department determines that the producer knew that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will be liquidated at the producer's assessment rate which the Department calculates for the producer in the review. If, on the other hand, the Department determines in the administrative review that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all-others rate if there was no company-specific review of the reseller for that review period.

Id. at 55,362. This position became Commerce's policy on May 6, 2003, and is not challenged by Plaintiff. *See* 68 Fed. Reg. 23,954. Rather, Parkdale and Russel challenge its application by Commerce as impermissibly retroactive.

B. Retroactivity and the Reseller Policy

Generally, a retroactive application of a regulation is permissible when Congress explicitly authorizes such effect. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result"); *Shakeproof Assembly*, 24 CIT at 492, 102 F. Supp. 2d at 493. "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen*, 488 U.S. at 208–09; *see id* at 216 (Scalia, J., concurring in the judgment) (observing that rule-making under Administrative Procedure Act contemplates rules having future effect). However, "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1362 (Fed. Cir. 2005). A retroactive provision "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994). The appropriate test is "whether the new provision attaches new legal consequences to events completed before its enactment."[3] *Id*. at 270. The Federal Circuit elaborated on the proper analysis of retroactivity:

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[3] *Landgraf* stated that "the presumption against statutory retroactivity is not restricted to cases involving 'vested rights.' " 511 U.S. at 275 n.29.

> the court must consider not only in a bright-line fashion whether a rule, regulation, or decision [1] "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past," but must also consider more comprehensively [2] the "nature and extent of the change of the law," [3] "the degree of connection between the operation of the new rule and a relevant past event," and [4] "familiar considerations of fair notice, reasonable reliance, and settled expectations."[4]

Princess Cruises, 397 F.3d 1362–63 (noting that "[m]erely categorizing rules or applications of rules as 'clarifications' or 'changes' provides little insight into whether a retroactive effect would result in a particular case").

Parkdale claims that because the Reseller Policy applies to merchandise entered between August 1, 2002, and July 31, 2003, the policy is retroactive in nature. Plaintiff contends that the Reseller Policy imposed additional legal consequences on Parkdale by changing "the circumstances under which resellers are relieved of additional liability, over and beyond the deposits already made." Pl.'s Br. 8. Characterizing the Reseller Policy as a radical "coin-flip" rule, Parkdale maintains that Commerce did not provide resellers with "fair notice" that additional duties on merchandise might be owed. Pl. Br. 9. As a reseller, Parkdale reasonably relied on the assumption that the cash deposit rate would be the assessment rate unless an administrative review of the reseller was requested. Parkdale further claims that resellers do not have the option of undoing entries made prior to the May 6, 2003, date of the Department's new assessment policy, and therefore, any contrary rule applied to entries prior to this date is retroactive. Pl.'s Br. 9.[5]

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[4] The Federal Circuit adopted the Supreme Court's explanation in *Landgraf* as guidance in evaluating retroactivity:

> The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have sound instincts and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance.

Landgraf, 511 U.S. at 269–70.

[5] Parkdale explains that after it had already taken the irreversible step of entering and reselling the merchandise, "Commerce changed the rules and allowed automatic liquidation upon fulfillment of a significant additional condition, namely that no party requests an administrative review of an unrelated third party." Pl. Br. 11. In this case that party would be Stelco, the producer from whom Parkdale purchased the merchandise. Pl. Br. 11. Parkdale argues that as a result of the Reseller Policy, "it no longer had reasonable protection against *additional* liability through automatic liquidation, because instead of needing only to rely upon a condition that had always occurred in the past (that nobody requests an administra-

Commerce counters the Reseller Policy did not have an impermissibly retroactive effect because the "Reseller Policy became effective upon entries for which the anniversary month occurred in May 2003 or later," i.e., after the publication of the new policy on May 6, 2003. Def.'s Br. 12. Defendant directs attention to its regulation providing that an administrative review covers all merchandise entered 12 months prior to "the most recent anniversary month." 19 C.F.R. § 351.213(e)(1)(I); *see* 19 U.S.C. § 1675(1). Commerce emphasizes that when "no information about import transactions with a particular reseller is before Commerce during the review, then the transactions of an importer who imports the subject merchandise from that reseller do not fall within the scope of the review." *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003), *opinion after remand* 28 CIT ___ , 346 F. Supp. 2d 1343 (2004), *aff'd*, 412 F.3d 1266 (Fed. Cir. 2005). This Court has upheld Commerce's "discretion to determine when and how to implement the final results beyond their literal, statutory scope." *Id.* Consequently, Commerce has authority to decide how to extend its determinations. Additionally, Commerce claims that since both parties were afforded the opportunity to file for administrative reviews, the Reseller Policy did not create "a new obligation, impose[ ] a new duty or attach[ ] a new disability, in respect to transactions or considerations already past." Def.'s Br. 13–14 (quoting *Princess Cruises*, 397 F.3d at 1358).

Commerce concedes that pursuant to *Princess Cruises* there was a relatively significant change in Commerce's treatment of resellers. Def.'s Br. 15. *See Consol. Bearings*, 412 F.3d at 1267 (concluding that "substantial evidence supports Commerce's determination that it has in the past consistently liquidated unreviewed entries from an unrelated reseller at the cash deposit rate when the manufacturer has no knowledge that the subject merchandise is ultimately destined for the United States"); *Consol. Bearings*, 346 F. Supp. 2d at 1346 (stating that "Commerce indicates that the [Reseller Policy] altered [Commerce's] past practice of assessing certain unreviewed entries at the cash-deposit rate to assessing them at the all-others rate"). The court will now turn to the other factors listed by the Federal Circuit to determine whether the Reseller Policy's application in this case was impermissibly retroactive.

1. *The Degree of Connection Between the Operation of the New Rule and a Relevant Past Event*

A retroactive rule "must also have a significant retroactive connection with past events." *Princess Cruises*, 397 F.3d at 1366. Prior to the Reseller Policy, Commerce would automatically liquidate a reseller's merchandise at the deposit rate unless the reseller or an-

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tive review of Parkdale), Parkdale also had to hope for something much less probable (that nobody would request an administrative review of Stelco)." Pl. Br. 11.

other petitioner took affirmative steps to request an administrative review of the reseller. The Reseller Policy changed the rate of liquidation in cases where the reseller is not reviewed. Parkdale contends that because resellers do not have the option of undoing importations before May 6, 2003, the date of the new assessment policy, the connection between its entry of merchandise and the new rule is significant. However, although the new rule affected the importer's ultimate liability, the degree of connection between the new rule and the entry of merchandise at issue is not significant because under relevant customs and antidumping duty laws the importer does not have a right to expect that duties would not change until entries are liquidated. *Cf. id.* at 1365 (finding significant degree of connection where new rule imposed harbor maintenance tax on passenger cruise liner and where liner did not document which passengers disembarked prior to rule to rebut evidentiary presumption of new rule).

Under Customs law, importers are put on notice that changes may occur to duties until liquidation or reliquidation of entries at issue. *See* 19 U.S.C. § 1500; *Dart Exp. Corp. v. United States*, 43 C.C.P.A. 64, 76 (1956). "No vested right to a particular classification or rate of duty or preference is acquired at the time of importation." *N. Am. Foreign Trading Corp. v. United States*, 783 F.2d 1031, 1032 (Fed. Cir. 1986) (citing *Norwegian Nitrogen Prods. Co. v. United States*[6], 288 U.S. 294, 318 (1932)). In cases involving importers' challenges to the application of new laws based on retroactivity, the courts have looked at liquidation as the relevant "past event" with respect to the operation of a new rule. *See, e.g. Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753 (Fed. Cir. 1997) (holding that liquidation or reliquidation of entries "is the triggering or operative event" for deciding whether application of statute or regulation is impermissibly retroactive); *Syva Co. v. United States*, 12 CIT 199, 204, 681 F. Supp. 885, 890 (1988) (stating that "the statute merely prescribes the time for payment of duties once the entries are liquidated, and since liquidation, the operative event triggering the time for assessment of interest, occurred after the statute was enacted, there is no retroactive application which would deprive plaintiff of any vested substantive right").

In the context of antidumping duty laws, the effect of liquidation as a triggering event is even more pronounced. Commerce operates "a 'retrospective' duty assessment system under which importers' final liabilities are determined after the actual importation of the merchandise." *Mittal Can., Inc. v. United States*, Slip Op. 06–20,

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[6] "No one has a legal right to the maintenance of an existing rate or duty." *Norwegian Nitrogen Prods.*, 288 U.S. at 318 (holding that Congress' or congressional committees' failure to give notice to parties affected by proposed change in tariff laws would not affect validity of change and that hearing cannot be demanded as of right).

2006 WL 319217, at *7 (not reported in F. Supp. 2d) (citing 19 C.F.R. § 351.212[7]). While importers entering merchandise subject to an antidumping duty order are required to make a cash deposit of *estimated* antidumping duties, this rate is not final if an administrative review is initiated. *Id.* When an administrative review covers a different party, 19 U.S.C. § 1675(a)(2)(C) does not afford an importer a statutory right to "enjoy . . . the rates established by the review." *Consol. Bearings*, 348 F.3d at 1005–06. As Commerce explains, importing the same merchandise does not mean that different importers will be subject to the same antidumping duties. *See id.* at 1006 (stating that section 1675(a)(2)(C) "neither requires nor precludes Commerce from applying [administrative review] results to entries outside the review"). These statutory and regulatory provisions significantly weaken Parkdale's position, because while entering merchandise is a relevant "past event" within the meaning of the *Princess Cruises* analysis,[8] it is not the triggering and operative event[9] that determines the assessment of antidumping duties.

2. *Considerations of Fair Notice, Reasonable Reliance, and Settled Expectations*

The court also considers fair notice, reasonable reliance, and settled expectations. *Princess Cruises*, 397 F.3d at 1366 (citing *Landsgraf*, 511 U.S. at 270). In this case, Plaintiff and Plaintiff-Intervenor had fair notice of Commerce's change in policy. Parkdale initially had notice of Commerce's proposed new policy regarding unreviewed resellers when it was preliminarily issued in 1998, years before the entries made during the period of review from August 8, 2002, through July 31, 2003. *See* 63 Fed. Reg. 55,361. Commerce gave additional notice to all resellers of this proposed change in March 2002. 67 Fed. Reg. 13,599. Parkdale even submitted comments on the proposal at this intermediate stage in the proceedings prior to the new rule becoming final. *Issues and Decision Mem.*, at 10

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[7] 19 C.F.R. § 351.212 provides:

> Unlike the systems of some other countries, the United States uses a "retrospective" assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported. Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered. This section contains rules regarding the assessment of duties, the provisional measures deposit cap, and interest on over - or undercollections of estimated duties.

[8] Specifically, in *Princess Cruises*, the Federal Circuit considered the importer's non-collection of data regarding how many passengers disembarked and/or boarded at layover ports covered by the new harbor maintenance tax. *Princess Cruises*, 397 F.3d at 1366.

[9] Defendant-Intervenor, United States Steel Corporation, alternatively proposed that the past triggering event for evaluating retroactivity is the time when the administrative review was requested.

(stating that Parkdale submitted comments on April 1, 2002, and Rusell supported Parkdale's views). Parkdale's comments evidence its awareness of the new policy. Importantly, the published Reseller Policy was applicable to entries made during the time for which parties could request a review after May 6, 2003. *See Rhone Poulenc*, 14 CIT at 365, 738 F. Supp. at 543. Commerce published its notice of opportunity to request an administrative review of subject merchandise for the relevant period of review on August 1, 2003, several months after the new rule came into effect, and Parkdale had until September 2, 2003, to file such a request.[10] *See* 68 Fed. Reg. 45,218; *cf. ALZ N.V. v. United States*, 27 CIT ___, 283 F. Supp. 2d 1302 (2003).[11]

Regarding reasonable reliance and settled expectations, nothing in the statutory or regulatory scheme provides Parkdale with an expectation that no one will request an administrative review of Parkdale. *See* Def. Br. 18. Parkdale's rationale that it "reasonably relied on the assumption that the cash deposit rate would be the assessment rate unless the reseller or the petitioner requested an administrative review of the reseller . . . [and] no party had ever previously requested an administrative review of Parkdale," Pl.'s Br. 12, impairs even Parkdale's strongest argument – that it suffered additional duty liability for past transactions. This position overlooks a statutory provision that any "interested party" can initiate an antidumping review. *See* 19 U.S.C. § 1675. There can be no objectively reasonable reliance on past non-occurrence of administrative actions otherwise warranted by the regulatory scheme. Nor can Parkdale successfully maintain that the all-others rate is an unfairly adverse rate, as the

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[10] "The fact that the subject merchandise may have entered before the publication of this clarification is immaterial because interested parties were aware of the new methodology prior to the start of the instant administrative review." *Issues and Decision Mem.* 11 (citing Reseller Policy, 68 Fed. Reg. 23,954, 23,956.

[11] In *ALZ N.V.*, Commerce adopted new countervailing duty methodology expressly making it applicable to all "CVD investigations initiated on the basis of petitions filed after December 28, 1998." 283 F. Supp. 2d at 1310 (citing 19 C.F.R. § 351.702). Prior to this rule, Commerce conducted a countervailing duty investigation, finding in March 1999 that GOB's purchase of the ALZ shares did not constitute countervailable subsidies. In July 2000, domestic parties requested that Commerce reinvestigate the Government of Belgium's (GOB) purchase of ALZ stock in 1985. *Id.* at 1305. Commerce reinvestigated the issue under the new methodology published in November 1998 and reached an opposite result in April 2001. *Id.* This Court held that Commerce could not apply the new methodology because the initial petition for this review was filed in March 1998, prior to the regulation's effective date of December 28, 1998. *Id.* at 1311. The Court noted that "the plain language of the regulations states that they apply to [a]ll CVD investigations initiated *on the basis of petitions filed after December 28, 1998*." *Id.* at 1311 n.5 (emphasis added). The Court found that "the presumption against retroactivity would counsel against such application in this case because application of the amended regulations to conduct occurring almost fifteen years before their amendment would arguably impose new duties with respect to transactions already completed." *Id.* at 1311. The present case is distinguishable from *ALZ N.V.* because Commerce did not apply the new policy in contradiction with the date expressly stated in the May 6, 2003, notice.

Department determines the "all-others" dumping margin based on the simple average of the calculated company-specific margins. *See* 63 Fed. Reg. at 55,362.

The court is not persuaded by Parkdale's argument that administrative review was a "false choice." Indeed, losing a right to effective administrative review would disturb both reasonable reliance and settled expectations. Pl.'s Br. 13–14. However, Parkdale and Plaintiff-Intervenor Russel offer only unsubstantiated arguments about futility and hardship of hypothetical administrative reviews for resellers that simply do not enhance their claim of retroactivity. They insist that it would have been difficult for them to participate in a review. Parkdale explains that it would experience enormous hardship as a reseller because of its inability to provide production costs of the merchandise that Parkdale resold and that it would have been subject to determination of its dumping margin based on "facts otherwise available." 19 U.S.C. § 1677e. Parkdale specifically referred to Russel's experience of attempting to go through an administrative review to avoid the liability of the 18.71 % "all-others" rate and withdrawing after Commerce refused to give Russel "any assurance that it would not penalize Russel for not being able to obtain production costs from an unaffiliated supplier." *See Parkdale's Case Br. 9* (citing Letter from Barbara E. Tillman to Beatrice A. Brickell (Dec. 29, 2003), A.R. Doc. No. 48).

Parkdale's claim that it would not get a satisfactory dumping margin upon review does not merit the court's consideration because 19 U.S.C. § 1677e[12] contemplates such results. *See, e.g.*, *Peer Bearing Co. v. United States*, 16 CIT 799, 805–06, 800 F. Supp. 959, 965 (1992) (finding that when resellers choose uncooperative suppliers that are under dumping order, it is irrelevant that such resellers are cooperative in their questionnaire responses). Furthermore, Russel withdrew from the review before its completion and simply does not serve as an example of Parkdale's "false choice" argument. *Cf. Koyo Seiko Co. v. United States*, 26 CIT 170, 176, 186 F. Supp. 2d 1332, 1339 (2002) (holding that foreign manufacturer was not required to exhaust administrative remedies before challenging Commerce's methodology for determining antidumping duty assessment rates because methodology had been previously unsuccessfully challenged at administrative level and additional challenge during review at issue would have been futile). Additionally, this Court recognizes that while "[s]mall businesses may face a dilemma where they can neither afford to participate in an administrative review nor to pay an erroneous antidumping rate[,] . . . the cost-benefit analysis and risk

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[12] In pertinent part, 19 U.S.C.A. § 1677e provides that "[i]f . . . necessary information is not available on the record, . . . the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle."

assessment involved is one an importing business must take." *J.S. Stone, Inc. v. United States*, 27 CIT ___ , ___ , 297 F. Supp. 2d 1333, 1344 (2003).

C. Plaintiff-Intervenor's "Practicable Assistance" Argument

In addition to supporting Parkdale's claim of unlawful retroactive application of the policy, Russel alleges that Commerce did not comply with 19 U.S.C. § 1677m(c)[13] when it failed in its duty to provide "practicable assistance" within meaning of that statute. *See Russel Br.* 11. Specifically, Russel claims that Commerce failed in this duty when it did not respond to Russel's "requests for assistance in answering section D of the antidumping questionnaire and did not properly consider the alternative forum in which Russel Metal Export could submit the cost information."[14] Pl.-Intervenor's Br. 11. Russel also states that it withdrew by the December 23, 2003, deadline because it did not receive a response from Commerce in response to its November 21, 2003, request.

Commerce claims that it responded to Russel appropriately by instructing it to supply the information to the "best of its ability." Def. Br. 25. Alternatively, Commerce claims that this argument is beyond the scope of this proceeding since it is not an issue raised by the Plaintiff. "[I]ntervenor is limited to the field of litigation open to the original parties, and cannot enlarge the issues tendered by or arising

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[13] Section 1677m(c) places a duty on Commerce to provide assistance to an importer who is unable to obtain the required information and suggests "alternative forms in which they are able to comply with the request." *China Steel Corp. v. United States*, 27 CIT ____ , ____ , 264 F. Supp. 2d 1339, 1356 (2003). It provides:

> (c) Difficulties in meeting requirements
>
> (1) Notification by interested party
>
> If an interested party, promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.
>
> (2) Assistance to interested parties
>
> The administering authority and the Commission shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by the administering authority or the Commission in connection with investigations and reviews under this subtitle, and shall provide to such interested parties any assistance that is practicable in supplying such information.

19 U.S.C § 1677m(c).

[14] Russel claims that it explained its difficulties in obtaining the cost of production numbers on two separate occasions and suggested as an alternative that the acquisition price be used instead. (Pl.-Intervenor's Br. 14.).

out of plaintiff's bill." *Torrington Co. v. United States*, 14 CIT 56, 57, 731 F. Supp. 1073, 1075 (1990) (citing *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U.S. 53, 56 (1935)) (granting plaintiff's motion to strike defendant-intervenor's affirmative defenses because they raised issue of standing not contested by plaintiff and defendant); *see also Grupo Indus. Camesa v. Unites States*, 18 CIT 107, 108 (1994) (not reported in F. Supp.) (holding that plaintiff-intervenor's argument was separate from plaintiff's claim because plaintiff did not challenge pertinent statute as unconstitutional even though complaint alleged that ITC's determination was not in accordance with law "in a number of respects, including the following").

Russel's claim that Commerce failed to provide "practicable assistance" under section 1677m is a claim distinct from Parkdale's even as it challenges Commerce's actions in a proceeding that Parkdale initiated. *See, e.g., China Steel*, 264 F. Supp. 2d at 1358 (involving claim as to whether "Commerce's duty to assist interested parties experiencing difficulties" was triggered during process of completing antidumping questionnaire).[15] Parkdale does not raise the issue of whether Commerce provided practicable assistance under 19 U.S.C. § 1677m(c). Parkdale would not be able to raise such an issue because it did not opt to go through an administrative review, let alone fill out a questionnaire, which is when Commerce would have been expected to provide the required assistance. Therefore, Russel's allegation that Commerce failed its duty under 19 U.S.C. § 1677m(c) goes beyond the scope of Parkdale's complaint and cannot be adjudicated in this proceeding.[16]

IV. CONCLUSION

Commerce's application of its Reseller Policy upon entries of subject merchandise exported by Plaintiff and Plaintiff-Intervenor is in accordance with law. Contrary to Parkdale's contentions, because Commerce's Reseller Policy became effective upon entries for which the anniversary month was May 2003 or later, the policy does not have an impermissibly retroactive effect. Accordingly, Plaintiff's motion for summary judgment on the agency record is denied.

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[15] In *China Steel*, the court found that plaintiff did "not meet the threshold requirements of 19 U.S.C. § 1677m(c)(1), as Plaintiff neither explain[ed] in detail the difficulties it experienced, nor suggest[ed] alternatives for supplying the deficient information." 264 F. Supp. 2d at 1357.

[16] There is record evidence that Commerce attempted a minimal response to Russel's concerns, but the court need not decide whether these attempts were sufficient under the statute. If the court had found the application of the Reseller Policy impermissibly retroactive and therefore not in accordance with law, Russel would have been entitled to relief.

ERRATUM

Parkdale International v. United States, Court No. 05–00316, Slip-Op 06–54, dated April 17, 2006.

Page 4: Replace the block quote citing *Antidumpting and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954, 23,954 (Dep't Comm., May 6, 2003) with this block quote:

> [A]utomatic liquidation at the cash-deposit rate required at the time of entry can only apply to a reseller which does not have its own rate if no administrative review has been requested, either of the reseller or of any producer of merchandise the reseller exported to the United States. If the Department conducts a review of a producer of the reseller's merchandise where entries of the merchandise were suspended at the producer's rate, automatic liquidation will not apply to the reseller's sales. If, in the course of an administrative review, the Department determines that the producer knew, or should have known, that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will be liquidated at the producer's assessment rate which the Department calculates for the producer in the review. If, on the other hand, the Department determines in the administrative review that the producer did not know that the merchandise it sold to the reseller was destined for the United States, the reseller's merchandise will not be liquidated at the assessment rate the Department determines for the producer or automatically at the rate required as a deposit at the time of entry. In that situation, the entries of merchandise from the reseller during the period of review will be liquidated at the all-others rate if there was no company-specific review of the reseller for that review period.

Slip Op. 06–55

DOUG SELIVANOFF, Plaintiff, v. UNITED STATES SEC'Y OF AGRICULTURE, Defendant.

Before: MUSGRAVE, Judge
Court No. 05–00374

[Negative trade adjustment assistance determination by Foreign Agricultural Service remanded for additional proceedings.]

Decided: April 18, 2006

Doug Selivanoff, plaintiff *pro se.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); *Jeffrey Kahn*, Office of the General Counsel, U.S. Department of Agriculture, for the defendant.

OPINION AND ORDER

The plaintiff, Doug Selivanoff, fisher of Alaska salmon, contests the denial of his application for trade adjustment assistance (TAA) cash benefits under 19 U.S.C. § 2401e by the United States Department of Agriculture, Foreign Agricultural Service (FAS). His trade or business consumed approximately 2100 hours per year during an eight-month fishing season for little more than $19,025 in the "pre-adjustment" year of 2001 as compared with $25,390 for 2003, both of which he duly reported as "ordinary income (loss)" for his "S" corporation Bear Fisheries Ltd. *Cf.* Pub R. at 7, 11, 13. The government argues that FAS's determination is correct and should be sustained. The specific issue on this appeal is whether Mr. Selivanoff's "net fishing income" declined over the pre-adjustment year of 2001. For the following reasons, this matter will be remanded to FAS for further proceedings not inconsistent with this opinion.

Jurisdiction; Standard of Review

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395. FAS's findings of fact will be considered conclusive if supported by substantial evidence on the record. 19 U.S.C. § 2395(b). Substantial evidence is "more than a mere scintilla" of evidence, it means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the [same] evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). In the absence of substantial evidence or for good cause shown, the matter will be remanded for further proceedings. *See id.* Further, "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret . . . statutory provisions, . . . determine the meaning or applicability of the terms of an agency action[,]" and set aside agency action found to be *inter alia* "not in accordance with law." 5 U.S.C. § 706. *See* 5 U.S.C.§ 702; *Bowen v. Massachusetts*, 487 U.S. 879, 911 (1988).

Background

In order to gain approval, an application for TAA cash benefits must demonstrate that the adversely affected commodity producer's

"net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer[.]" 19 U.S.C. § 2401e(a)(1)(C). The relevant implementing regulation expanded upon that authority[1] by including a definition of "net fishing income":

> Net fishing income means net profit or loss, excluding payments under this part, reported to the Internal Revenue Service ["IRS"] for the tax year that most closely corresponds with the marketing year under consideration.

7 C.F.R. § 1580.102 (Nov. 1, 2004).

In his individual capacity, Mr. Selivanoff initiated a timely application for TAA benefits on January 5, 2005. *See* Pub. R. at 1. In a letter accompanying the application, dated January 3, 2005, Mr. Selivanoff explained[2] his situation as follows:

> In 2001 we had a bigger gross stock than in 2003. I did however have more expenses in 2001 (primarily a repair on the bow of the boat[)]. On my Bear Fisheries Ltd. tax return form 1120S

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[1] Section 141 of the Trade Act of 2002 amended title II of the Trade Act of 1974 to authorize the Secretary of Agriculture to provide TAA cash benefits for an adversely affected "agricultural commodity producer." Pub. L. 107–210, 116 Stat. 933, 946–952 (2002). *See* 19 U.S.C. § 2401(2). The amendment described "agricultural commodity producer" as a "'person' as prescribed by regulations promulgated under section 1001(5) of the Food Security Act of 1985 (7 U.S.C. § 1308(e))." *See* 7 C.F.R. § 1400.3. Such definition did not specify fishermen; however, Section 143 of the Trade Act of 2002 directed the Secretary of Commerce to study and report to Congress "whether a trade adjustment assistance program is appropriate and feasible for fishermen . . . [assuming] the term 'fishermen' means any person who is engaged in commercial fishing or is a United States fish processor." 116 Stat. at 953. FAS then published proposed 7 C.F.R. Part 1580 in order to develop regulation of TAA for agricultural commodities producers. In response, it received numerous comments supporting extension of TAA to fishers of "wild Alaska salmon, who face stiff competition from imported farm-raised salmon." *See Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 50048, 50049 (Aug. 20, 2003). Some commenters argued for extending TAA to "all fishermen" but FAS concluded that extending TAA to "all fishermen" would be incompatible with the aforementioned Section 143. *Id.* FAS decided instead to extend TAA coverage to "aquaculture," defined "to include products propagated and raised in controlled environments for the purpose of human consumption, and it covers fishermen whose catch is adversely affected by imported aquaculture products." *Id.* On October 28, 2003, the FAS found that due to imports of salmon, the landed prices for Alaska salmon declined by 34.6% over the preceding five-year average. *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 62766 (Nov. 6, 2003). FAS therefore certified a TAA petition filed by Alaska fishermen for TAA benefits. *Id.* Adversely affected agricultural commodity producers such as Mr. Selivanoff were thus eligible to file for cash benefits within 90 days after issuance of the certificate of eligibility. *See* 19 U.S.C. § 2401e. Subsequently, on September 23, 2004, FAS re-certified the petition after finding that landed prices for Alaskan salmon remained below the 80 percent threshold. *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 60350 (Oct. 8, 2004). A year later, on October 6, 2005, FAS de-certified the petition from eligibility. *See Trade Adjustment Assistance for Farmers*, 70 Fed. Reg. 60487 (Oct. 18, 2005).

[2] The text of plaintiffs' submissions are transcribed verbatim hereinafter with only minor alterations for the sake of clarity.

> Line 9, in 2001 I had $19,815 versus in 2003 [$]6,890, difference of $12,925.00.
>
> On Line 32 schedule E in 2001 the total was 17,836[;] in 2002 the total was 23,594, a difference of 5,758.00. If the repairs were the same in 2001 & 2003 I would of made in 2001 over $7,000 more dollars. It doesn't seem quit right that I wouldn't qualify because of necessary maintenance.

Pub. R. at 3.

At the bottom of the application are four questions to be answered by the local Farm Service Agency that ask whether the applicant has provided proof of adjusted gross income less than $2.5 million, "production" of the "commodity," receipt of technical assistance, and "supporting documentation verifying that the . . . net fishing income declined from the petition's pre-adjustment year?" *See* Pub. R. at 1. Regarding the last item, the case officer of the local Farm Service Agency office checked "No" on January 13, 2005, albeit with respect to the column headed "Date Documentation Received." *Id*. The application relied on certain documentation in respect of Mr. Selivanoff's application for TAA benefits for the prior period, including completion of technical assistance on March 19, 2004. *See id*. at 4–10.

Mr. Selivanoff's completed application was forwarded to FAS on May 5, 2005. *See* Pub. R. 1, 62. It included two IRS 1120S forms (U.S. Income Tax Return for an S Corporation) for the 2001 and 2003 years. *Id*. at 11, 13. Those documents show "ordinary income (loss) from trade or business activities" in the amounts of $19,025 and $25,390, respectively. *Id*. FAS denied Mr. Selivanoff's application for TAA on April 1, 2005. The letter explained: "You have been denied a TAA cash benefit because the documentation you provided the Farm Service Agency indicates that your 2003 net fishing income was greater than your 2001 net fishing income." Pub. R. 62. The letter also informed that the disapproval was final and that Mr. Selivanoff could seek review in this Court. *Id*.

Proceeding *pro se*, Mr. Selivanoff wrote to the Court by letter dated May 23, 2005 to seek review of the adverse determination. The Clerk of the Court deemed the letter as fulfilling in principle the requirements of a summons and complaint for the commencement of a civil action, and copies were served upon FAS and the United States Department of Justice. The government filed its answer on July 25, 2005. After the matter was assigned to these chambers, Mr. Selivanoff filed a letter that was deemed a motion for judgment on December 7, 2005. The government responded on January 13, 2006, and Mr. Selivanoff filed his reply on February 13, 2006.

Discussion

Mr. Selivanoff's TAA application describes "necessary maintenance" to his boat for the 2001 year as distorting his "normal" in-

come. *Cf.* Pub. R. at 3 ("[i]f the repairs were the same in 2001 & 2003 I would of made over $7,000 more dollars"). In his letter to the Court of November 30, 2005, he elaborated as follows:

> If we start with my gross (and I mean gross) stock the simplest figure in 2001 our stock was $130,954.00 we caught 700,000 pounds of Salmon.
>
> In 2003 our stock was $128,795.00 and we caught 1.1 million pounds indicating a reduction of fish price by over 30%. Now we have two figures that indicate a drop from 2001 to 2003, our gross stock and fish price (we lost pricing power).
>
> At this point the denial of these benefits have penalized me for working harder and trying to make the most of a bad situation. My so-called increase in income in 2003 has come from several things.
>
> 1) In 2001 a storm got me and I incurred $19,815 in damages, I guess I was lucky to be alive, had this happened in 2003 you would of never heard from me because I would qualify.
>
> 2) In 2003 I reduced my crew by one, I increase my workload by 25%. Grub and Insurance costs dropped in 2003 because of the reduction of crew. Increasing my profits but the workload increased.
>
> 3) By 2003 my boat had pretty much been depreciated out. In 2001 my depreciation was $4,135.00 and in 2003 it was $812.00
>
> * * * * *
>
> I appeal to you not to look at some line item but to look at the bigger picture here. In 2003 we worked harder, caught more fish but made less money than in 2001, it is that simple.

Doc. R. 1.

Would that it were. Apparently referencing the impact upon financial statements of extraordinary expenses and noncash matters, it appears Mr. Selivanoff's argument is that his net profit for 2001 as shown on line 21 of IRS form 1120S does not provide an accurate baseline figure against which to evaluate his net profit for 2003, which FAS has implicitly determined constitutes his "net fishing income," also defined as "net profit or loss." *See* 19 U.S.C. § 2401e(a)(1)(C); 7 C.F.R. § 1580.102. The government urges judicial deference to FAS's interpretation of net fishing income as reasonable.

Net fishing income is what distinguishes a producer harmed by import competition and entitled to cash benefits. Decisions to date have emphasized that Congress clearly delegated to the Secretary of

Agriculture the authority to determine "net farm income," from which the Court's decisions have uniformly concluded that FAS's interpretation of "net fishing income" as including all commercial fishing income sources and excluding non-fishing sources of income has been reasonable. *E.g. Steen v. Sec'y of Agriculture*, 395 F. Supp. 2d 1345 (CIT Oct. 3, 2005); *Cabana v. U.S. Sec'y of Agriculture*, Slip Op. 05–93 (CIT Aug. 1, 2005), *sust'd after remand* Slip Op. 06–27 (CIT Feb. 28, 2006) (negative determination sustained). It bears repeating, however, that Congress mandated that the Secretary *determine* net farm income, not merely determine the *meaning* of net farm income; rote reliance upon a single line item "reported to the Internal Revenue Service" without further analysis or, as necessary, further investigation will not suffice. *Cf. Rood v. U.S. Sec'y of Agriculture*, Slip Op. 05–112 (CIT Aug. 29, 2005), *sust'd after remand* Slip Op. 06–31 (CIT Mar. 1, 2006) (benefits awarded); *Do v. U.S. Sec'y of Agriculture*, Slip Op. 06–29 (CIT Feb. 28, 2006) (capital gain not reported on Schedule C was therefore not included in "net fishing income" determination); *Trinh v. U.S. Sec'y of Agriculture*, 395 F. Supp. 2d 1259, 1271–1272 (CIT Aug. 29, 2005) (remanded due to inadequate investigation of claim involving "bigger repairs on the boat in 2001" as compared to 2002 in light of amended tax return filing). *Steen* and *Cabana* upheld FAS's interpretation to consider overall net "fishing income" as the relevant determinant, while *Rood*, *Do* and *Trinh* demonstrate that it is appropriate to exclude "non-fishing income" items therefrom. Implicit in all decisions is recognition of the need to make apples-to-apples comparisons between the claim year and pre-adjustment year figures.

In the TAA context, "net" means "[f]ree from, or not subject to, any deductions; remaining after all *necessary* deductions have been made." *Oxford English Dictionary*, vol. X, p. 340 (2d ed. 1989) (italics added). The question remains: net of what? If Mr. Selivanoff is arguing that FAS erred because it failed to exclude, or at least consider, extraordinary expenses items in its determination of his net fishing income, the argument has a certain appeal, because a single profit or loss figure does not provide a complete picture of all of the factors affecting the change in a person's financial status, which is the object of the comparison in subparagraph 2401e(a)(1)(C). A single profit or loss figure is, by definition, intended to be net of all relevant influences. Those may or may not include noncash and extraordinary expenses, such as capital gains or losses, depending upon the perspective sought. *Cf. West Ohio Gas Co. v. Public Utilities Comm'n of Ohio*, 294 U.S. 63, 75 (1935) (extraordinary expenses are a charge upon capital rather than a charge upon income); *Taylor v. Mayo*, 110 U.S. 330, 338 (1884) (improvements are extraordinary expenses). Indeed, the Farm Financial Standards Council (FFSC) urges that in order to provide an accurate picture of net farm income, the concept

should include all gains and losses from disposal of farm capital assets *unless* those gains or losses qualify as an extraordinary item.[3]

Based upon FAS's position in *Do*, the FAS would regard extraordinary gains as "non-fishing income" events. Logically, such ought, therefore, to apply to extraordinary losses as well. Indeed, the regulation itself does not include *all* income but excludes "payments under this part[.]" *See* 7 C.F.R. § 1580.102. On the other hand, the capital gain in *Do* was not reported as income, extraordinary or otherwise, on the relevant Schedule C to IRS form 1040. In that case, the argument was for *inclusion*, not exclusion, of a reported (albeit in another section of IRS form 1040) event with respect to the relevant Schedule C that FAS examined for net fishing income. Here, the Court confronts a plea for *exclusion* of items that were included on a Schedule C, which Mr. Selivanoff took as deductions in achieving the net profit for 2001 that he reported to the IRS. But, the relevance of such distinction is not discernable. If it is true, as Mr. Selivanoff apparently argues, that his net profit for 2001 is not representative of a "normal" year's profit, the obvious question would be, what is a "normal" year? One answer might be provided by the law of averages, which would point in favor of using the average or weighted-average of several financial periods. *Cf.*, *e.g.*, 19 U.S.C. § 2401e (TAA petition for eligibility is based upon a five-year average of price data concerning the adversely affected commodity). Such a solution, however, would be a legislative matter for Congress and not this Court. On the other hand, in comparing the net profit of the claim year to the net profit of the pre-adjustment year, FAS is merely complying with what is statutorily required of it. *See id.* § 2401e(a)(1)(C). It is, nonetheless and as previously mentioned, a matter of some import that FAS *determine* whether items that have been reported to the IRS are appropriate to the determination of net fishing income. A particular IRS form 1040's Schedule C may encompass two lines of business, one fishing and the other non-fishing, just as it may embody extraordinary income and deduction items, which may or may not be pertinent to a determination of net fishing income. But, as *Rood* and like cases re-affirm, it is only the net fishing income that is relevant. *See, e.g.*, *Rood*, *supra*; *Cabana*, *supra*. The government, perhaps therefore, emphasizes that the circumstances

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[3] *Financial Guidelines for Agricultural Producers*, at 22 (FFSC, Dec. 1997). According to the FFSC, in order to be an extraordinary item, the transaction should be:

> a. *Unusual in nature.* The underlying event possesses a high degree of abnormality, and is of a type clearly not related to, or only incidentally related to, the ordinary and typical activities of the enterprise.
>
> b. *Infrequent in occurrence.* The underlying event is of a type that would not reasonably be expected to recur in the foreseeable future, taking into account the environment in which the enterprise operates.

Id.

about which Mr. Selivanoff complains had the effect of reducing his tax liability in 2001 in comparison with 2003. *Cf.* Pub. R. 11 *with id.* at 13. That is true, but disclosure for the purpose of taxation is different than discovery by FAS for the purpose of determining benefits. There may be overlap of income and deductions for both purposes, but income and deductions relevant to the latter are not necessarily as all-encompassing as the former.

FAS's regulation, 7 C.F.R. § 1580.102, states that net fishing income shall be the net profit or loss reported to the IRS.[4] If this is read to imply subdelgation of the determination of net profit or loss to the IRS, a subdelegation of authority to another agency is not necessarily objectionable as a general matter, but without express congressional authorization therefor, its parameters must be discerned through the statute's purpose. *Assiniboine & Sioux Tribes of Fort Peck Indian Reserv. v. Board of Oil and Gas Conserv. of State of Montana*, 792 F.2d 782, 795 (9th Cir. 1986); *Rodriguez v. Compass Shipping Co.*, 617 F.2d 955, 959 (2d Cir. 1980), *aff'd*, 451 U.S. 596 (1981). *See, e.g.*, 5 U.S.C. § 1104 (delineating subdelegation authority of Director of Office of Personnel Management). Any permissible subdelegation may not exceed the agency's own delegated authority from Congress. *Vierra v. Rubin*, 915 F.2d 1372, 1378 (9th Cir. 1990). In this instance, the purpose of the statute is to assist agricultural commodity workers in the face of intense import competition affecting their livelihood, and Congress has clearly directed the Secretary of Agriculture to *determine* net farm (fishing) income. If the regulation is read as implying that FAS merely accepts and does not subject a particular net profit (loss) line item—as reported to the IRS, in the convention its forms require—to further analysis in light of an applicant's claims with respect thereto, then FAS has, in effect, subdelegated the determination of net farm or fishing income to the IRS, in derogation of its statutory mandate. *See* 19 U.S.C. § 2401e(a)(1)(C). *See, e.g., U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 564–568, 360 U.S.App.D.C. 202, 212–216 (D.C. Cir. 2004), *cert denied*, 543 U.S. 925 (2004) (FCC can not delegate unbundling decisions to state utility commissions); *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 641–43 (5th Cir. 1983) (agency record requires proof of review and consideration prior to agency's reliance upon work product of others); *Sierra Club v. Lynn*, 502 F.2d 43, 59 (5th Cir. 1974), *cert. denied*, 421 U.S. 994 (1975) (third parties may participate in preparation of environmental impact reports as long as agency does not abdicate responsibilities and rubberstamp their work product).

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[4] As noted in *Trinh* (*supra*) however, the rule also permits "(i) Supporting documentation from a certified public accountant or attorney, or (ii) Relevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency. . . ." 7 C.F.R. § 1580.301(e)(6).

Cf. Apotex, Inc. v. Thompson, 347 F.3d 1335, 1349 (Fed. Cir. 2003) (acknowledging principle that subdelegation must derive from lawful authority). Contrary to the government's implicit premise that it is sufficient for FAS merely to adopt a summary line item reported to the IRS, the regulation does not preclude argument on and interpretation of all relevant data pertinent thereto but reflects congressional intent that FAS determine net fishing income through consideration of such data.

FAS's negative determination letter to Mr. Selivanoff states simply that his application for TAA benefits was denied "because the documentation you provided the Farm Service Agency indicates that your 2003 net fishing income was greater than your 2001 net fishing income." Pub. R. at 62. The letter does not detail *why* that is so. Further, the Court cannot discern from the record whether FAS actually undertook analysis to determine net fishing income, or whether it simply relied on a comparison of the bottom-line items that were reported to the IRS, notwithstanding that Mr. Selivanoff clearly raised the claim that he had significantly higher expenses in 2001 due to repairs to his boat. *See* Pub. R. at 3. On the one hand, the boilerplate ultimately issued as FAS's negative determination mirrors the paucity of Mr. Selivanoff's own explanation, at the outset of his application, regarding such damages (which he here asserts were due to a storm that left him "lucky to be alive"), however it was at least clear, at the time, that he was contesting the impact of such expense reported on his 2001 net income or profit. With neither an accounting nor legal background, Mr. Selivanoff's application at least asserted sufficient facts to raise a colorable issue that bore on the determination. Yet, other than the checked and dated boxes completed by the local Farm Service Agency office on Mr. Selivanoff's application and its final negative determination addressed to him, *see* Pub. R. at 1 & 62, there are no indicia of further contact with Mr. Selivanoff and not a single note or comment to indicate FAS's consideration of Mr. Selivanoff's application. In short, the Court cannot state with confidence that this record reflects a determination made with the "utmost regard" for Mr. Selivanoff's interests.[5] *See Trinh*, *supra*, 395 F. Supp.2d at 1267 and cases cited. Consistent with this opinion, the

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[5] *Post hoc* rationalization will not do. *E.g. ILWU Local 142 v. Donovan*, 10 CIT 161, 164 (1986). "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Although Mr. Selivanoff did not initially raise the depreciation and restructuring items ('grub and insurance' and crew costs) before FAS, this is not fatal to these claims because it appears the investigation was inadequate in any event. The government argues that such costs have been properly accounted for; however, FAS should consider these items in the first instance, as it would not be prudent at this juncture for the Court to comment on their impact on the determination.

matter therefore requires fuller investigation, consideration and explanation.

Conclusion

For the foregoing reasons, it is appropriate to remand this matter to the Foreign Agricultural Service for further proceedings not inconsistent with this opinion. On remand, FAS shall determine (a) whether Mr. Selivanoff's points, each individually, are in the nature of ordinary or extraordinary deductions, and (b) if the latter, whether each item is to be included or excluded from the determination of net fishing income, and file its remand results with the Court within 45 days from the date of this opinion, whereupon the parties may have 15 days to make any comments with respect thereto, and no rebuttal without leave. If FAS is satisfied as to the veracity of Mr. Selivanoff's assertions and considers that additional fact finding is unnecessary in order for FAS to make its full and considered determination, with the utmost regard for Mr. Selivanoff's interests, then it need not reopen the administrative record, but it shall also consider any additional information that Mr. Selivanoff may choose to submit, unsolicited, to FAS in order to support his claim, should he so choose. In this regard, Mr. Selivanoff is advised to contact counsel for the defendant for further instructions on how to do so.

SO ORDERED.